



**BRITISH COLUMBIA REVIEW BOARD**

**IN THE MATTER OF PART XX.1 (Mental Disorder) OF THE *CRIMINAL CODE*  
R.S.C. 1991 c. 43, as amended S.C. 2005 c. 22, S.C. 2014 c. 6**

**IN THE MATTER OF AN APPLICATION FOR AN ORDER TO RESTRICT PUBLICATION  
OF THE REVIEW BOARD'S REASONS IN THE MATTER OF**

**MICHAEL WAYNE PALMER**

**DATED:** July 25, 2023

**BEFORE:**                   **CHAIRPERSON:** P. Singh  
**MEMBERS:**               Dr. R. Stevenson, psychiatrist  
                                  D. LePard

**SUBMISSIONS:**       **ACCUSED/PATIENT:** Michael Palmer  
**ACCUSED/PATIENT COUNSEL:** D. Abbey  
**ATTORNEY GENERAL:** L. Ruzicka KC, G. Nelson

## **RULING**

[ 1 ] The accused, Michael Wayne Palmer, applies for a publication ban of the reasons for disposition issued by the British Columbia Review Board (Board) for his fitness hearings. The Board dismisses that application.

[ 2 ] The Board will adhere to two prior court-ordered publication bans that remain in effect for Mr. Palmer's case. In accordance with those bans, and prior to public circulation of its reasons for disposition to non-parties, the Board will redact reference to any evidence taken at the accused's preliminary inquiry and court fitness hearing.

[ 3 ] The Board directs that its reasons for disposition for Mr. Palmer's fitness hearings not be publicly disclosed for a period of 21 days from the date of these reasons.

## **BACKGROUND**

### History of Review Board hearings

[ 4 ] Mr. Palmer is before the Board as a result of receiving a verdict of unfit to stand trial on April 29, 2021 at the British Columbia Provincial Court at Kamloops. The accused is charged with one count of second-degree murder, three counts of attempted murder, and one count of assault of a peace officer with a weapon contrary to sections 235, 239(1)(b), and 270.01(1)(a) of the *Criminal Code*, respectively.

[ 5 ] On June 11, 2021, the Board held an initial hearing to determine whether Mr. Palmer was fit to stand trial and to make a disposition. The Board reached the opinion that Mr. Palmer remained unfit to stand trial and ordered that he be held in strict custody for six months. The Board issued its disposition and reasons for disposition to the parties.

[ 6 ] On December 6, 2021, the Board held a second hearing to determine whether Mr. Palmer was fit to stand trial and to make a disposition. The Board reached the opinion that Mr. Palmer remained unfit to stand trial and ordered that he be held in strict custody for 12 months. The Board issued its disposition and reasons for disposition to the parties.

[ 7 ] On December 1, 2022, the Board held a third hearing to determine whether Mr. Palmer was fit to stand trial and to make a disposition. The Board reached the opinion that Mr. Palmer remained unfit to stand trial and ordered that he be held in strict custody for 12 months. The Board issued its disposition and reasons for dispositions to the parties.

## Application for a Publication Ban

[ 8 ] At the commencement of the June 11, 2021 hearing, Mr. Palmer brought an application for a publication ban which sought to prevent the publication of the reasons for disposition, disposition information, and transcripts for his fitness hearings. The Board made no ruling on the application at the time and requested written submissions. The Board agreed it would not release its disposition or reasons for disposition to anyone other than the parties until the accused's application for a publication ban was resolved.

[ 9 ] Mr. Palmer later amended his application to seek a publication ban of only the Board's reasons for disposition. In the alternative, he sought redactions to the reasons prior to public circulation. The accused reserved his right to file a further application for a publication ban regarding disposition information and transcripts for his fitness hearings if a public request for this information was made.

[ 10 ] The Attorney General provided submissions in support of the accused's application. No submission was received from the Director. The Board notified several media outlets of the accused's application and invited submissions, but none were received.

## **ANALYSIS**

### Jurisdiction

[ 11 ] Prior to considering the merits of the application, the Board must first consider whether it has jurisdiction to order a publication ban.

[ 12 ] Recently, in *Fairgrieve v. British Columbia Review Board*, 2022 BCSC 1882 (*Fairgrieve*), the court concluded that the Board, as part of its power to control its own process, is empowered to redact its dispositions and reasons for disposition. As the accused in that case did not seek a publication ban, the court did not rule on whether the Board's power to control its own process extends to publication bans.

[ 13 ] The Attorney General submits that the Board has jurisdiction to impose a publication ban. The Attorney General argues that since the court in *Fairgrieve* concluded that the Board has the power to make redactions to reasons for disposition as part of the Board's authority to control its own process, the "logical extension" of the court's analysis is that the Board must also have jurisdiction to impose a publication ban pursuant to that same authority, if the legal test for a ban is satisfied.

[ 14 ] Similarly, Mr. Palmer submits that the court ruling in *Fairgrieve* suggests that the Board has “ancillary or implicit” jurisdiction to control public access to Board information through a publication ban.

[ 15 ] The Board is a creature of statute and its powers are limited to those conferred upon it by the *Criminal Code*. While the Board has considered the parties’ position on jurisdiction, the Board also notes that Parliament included powers to order publication bans over evidence and information elsewhere in the *Criminal Code* (for example, respecting judicial interim releases [s. 517], or respecting evidence taken at preliminary inquiries [s. 539]). However, in Part XX.1 of the *Criminal Code*, which sets out the Board’s functions and jurisdiction, the only powers expressly conferred by Parliament on the Board to restrict publication are those found in s. 672.501 concerning the identities of victims and witnesses.

[ 16 ] In the circumstances of this case, however, the Board finds it unnecessary to determine the issue of jurisdiction and declines to do so. This is because even if the Board were to assume, without finding, that it has jurisdiction to order a publication ban, it would nevertheless dismiss the application on its merits.

[ 17 ] It is to the issue of merits that the Board turns next.

#### Test for publication ban

[ 18 ] Court openness is fundamental to the rule of law. The Supreme Court of Canada in *Sherman Estate v. Donovan*, 2021 SCC 25 (*Sherman Estate*) recently reaffirmed that “the open court principle is one of the foundations of a free press given that access to courts is fundamental to newsgathering” and the court emphasized “the importance of open judicial proceedings to maintaining the independence and impartiality of the courts, public confidence and understanding of their work and ultimately the legitimacy of the process” (*Sherman Estate* at para. 39).

[ 19 ] These concerns give rise to a strong presumption in favour of court openness. To rebut the presumption, the court in *Sherman Estate* set out a three-step analysis for all discretionary decisions, including publication bans, which seek to restrict the open court principle. The applicant must establish that:

- i. court openness poses a serious risk to an important public interest;
- ii. the order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent the risk; and
- iii. as a matter of proportionality, the benefits of the order outweigh its negative effects.

### Mr. Palmer's right to privacy

[ 20 ] Mr. Palmer applies for a publication ban to protect his privacy interests. He endorses the Attorney General's submission that disclosure of medical information impacts his dignity in the manner contemplated by *Sherman Estate*.

[ 21 ] As to whether privacy concerns constitute an important public interest on the first element of the *Sherman Estate* test, the court in *Sherman Estate* held that intrusions upon privacy which merely disturb the "sensibilities of the individuals involved" or which cause "discomfort and embarrassment" or which are "disadvantageous" or "distressing" do not invoke an important public purpose (at para. 48, 56, and 63). Rather, the court held that the aspect of privacy which invokes an important public interest is the protection of dignity. The court held that "protecting individuals from the threat to their dignity that arises when information revealing core aspects of their private lives is disseminated through open court proceedings is an important public interest for the purposes of the test" (at para. 73). The court held that dignity is at stake where the information that will be revealed consists of "intimate or personal details" that is "sufficiently sensitive to strike at an individual's biographical core" (at para. 75 and 79). Examples provided by the court included stigmatized medical conditions, stigmatized employment, sexual orientation, and subjection to sexual harassment and assault (at para. 77). The court reiterated that there must be serious risk to the concern for dignity and that "[r]ecognizing that privacy, understood in reference to dignity, is only at serious risk where the information in the court file is sufficiently sensitive erects a threshold consistent with the presumption of openness" (at para. 76).

[ 22 ] In this case, Mr. Palmer submits that his diagnosis of schizophrenia is a stigmatized medical condition. He says that in order for the Board to explore the issue of fitness and disposition, the Board is required to delve into the diagnosis, symptoms, treatment, and prognosis of the illness which impacts his dignity in the manner contemplated by the court in *Sherman Estate*.

[ 23 ] While the Board recognizes there may be stigma associated with severe mental illness such as schizophrenia, the Board finds that, as a matter of proportionality on the third element of the *Sherman Estate* test, the benefits of a publication ban to address the accused's privacy concerns do not outweigh its negative effects.

[ 24 ] Regarding the intersection of privacy interests and proportionality, the court in *Sherman Estate* noted that the interest in public disclosure of important, relevant information central to a case may supersede any privacy interests in that information. The court stated that:

In balancing the privacy interests against the open court principle, it is important to consider whether the information the order seeks to protect is peripheral or central to the judicial process... There will doubtless be cases where the information that poses a serious risk to privacy, bearing as it does on individual dignity, will be central to the case. But the interest in important and legally relevant information being aired in open court may well overcome any concern for the privacy interests in that same information. This contextual balancing, informed by the importance of the open court principle, presents a final barrier to those seeking a discretionary limit on court openness for the purposes of privacy protection. (at para. 106)

[ 25 ] In this case, Mr. Palmer seeks a publication ban of the Board's reasons for disposition for his fitness hearings or, in the alternative, substantive redactions to the reasons. The proposed redactions include reference to:

- a. medications taken by the accused and their impact on the accused;
- b. treatment and course of behaviour of the accused while at the Forensic Psychiatric Hospital;
- c. opinions of psychiatrists as to the accused's fitness to stand trial;
- d. evidence of the accused in response to fitness questions at the hearing;
- e. diagnosis, symptoms, treatment, and prognosis of the accused's mental illness;
- f. opinions of psychiatrists on the risk assessment for the accused; and
- g. the Board's analysis regarding the accused's fitness and disposition.

[ 26 ] The Board notes that the proposed redactions all relate to information routinely included in Board reasons. This information, viewed as a whole, is central to the decision-making process of the Board and is necessary to explain the basis for the Board's decision regarding the accused's fitness and disposition.

[ 27 ] Given the Board's important mandate to protect public safety while balancing the reintegrative and other needs of the accused, there is a strong public interest in ensuring transparency in the Board's decision-making process. Robust reasons allow the public to understand how the Board arrives at decisions that impact public safety and maintains confidence in the integrity of the Board's processes.

[ 28 ] Accordingly, the Board finds that, as a matter of proportionality, the public interest in important and legally relevant information aired in open court to allow public understanding of the Board's reasons supersedes Mr. Palmer's concern for the privacy interests in that same information.

#### Mr. Palmer's right to a fair trial

[ 29 ] Mr. Palmer also submits that a publication ban of the Board's reasons for disposition is necessary to safeguard his right to a fair trial. He relies on cases such as *R v. Gregson* [2010] OJ No 5625 (*Gregson*), in which the court prevented media access to an accused's pre-trial psychiatric assessment report, in support of his position that his diagnosis of schizophrenia is not merely an element of his medical history but may play a significant role in his right to a fair trial and in any defence raised at trial.

[ 30 ] The Board distinguishes *Gregson* from Mr. Palmer's case. What is at issue in Mr. Palmer's case is a ban on publication of the Board's reasons for disposition rather than a psychiatric report. While reasons may contain some of the same information that is contained in a psychiatric report, the public interest in having reasons publicly available is significantly higher. This is particularly so for this Board whose mandate is to protect the public. Reasons explain to the public how decisions are reached by courts or tribunals, thereby playing a vital role in ensuring that the justice system is transparent.

[ 31 ] The Board considered a similar issue in *Fairgrieve*. In that case, the accused, Richard Fairgrieve, was charged with second-degree murder similar to Mr. Palmer and was found unfit to stand trial by the British Columbia Provincial Court. The Board subsequently conducted a fitness and disposition hearing and determined that Mr. Fairgrieve was unfit to stand trial and made a custodial disposition, as it did with Mr. Palmer.

[ 32 ] Mr. Fairgrieve brought an application to restrict public disclosure of Board information, including its reasons for disposition, to safeguard his right to a fair trial. As with Mr. Palmer, Mr. Fairgrieve argued that his fair trial interests and ability to raise a defence at trial may be prejudiced by release of medical information by the Board.

[ 33 ] In rejecting Mr. Fairgrieve's argument, the Board stated the following:

Even if "substantial prejudice" exists in relation to these [fair trial] interests, which we do not find, it cannot be said that "in the circumstances, protection of the accused takes precedence over the public interest in disclosure". The "circumstances" here include that the potential for actual harm to Mr. Fairgrieve's fair trial interests is ill-defined and speculative; that juries can be expected to behave in accordance with their oaths (*R. v. Sherratt*, [1991] 1 S.C.R. 509); and that challenges for cause and jury instructions offer a

further protection against an unfair trial: *R. v. Haevischer*, [2013] BCSC 2014 at para. 39. Likewise, courts have held that gaps in time between the reporting of information in the media and the date of the jury trial reduces risk of an unfair trial: *R. v. Haevischer* at paras. 28-38. There is likely to be such a gap in this case, if indeed Mr. Fairgrieve ever stands trial.

Global News cites *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 SCR 97 for the proposition that the vast majority of criminal trials can proceed fairly even in the face of a great deal of publicity. The Panel agrees that this observation militates in favour of a conclusion that the public interest in the present case outweighs Mr. Fairgrieve's interests, especially as he has not particularized how his fair trial interests will be harmed.

(Board's reasons dated December 3, 2021 at para. 131-132)

[ 34 ] Mr. Fairgrieve subsequently brought a *certiorari* application to the BC Supreme Court seeking to set aside the Board's decision. In dismissing the application, the court found the Board's decision to be reasonable and stated the following:

... Mr. Fairgrieve evidently disagrees with the panel's decision, but he has not shown any failure of rationality in the panel's reasoning, nor has he demonstrated that the outcome is untenable in view of the relevant factual and legal constraints as contemplated in *Vavilov* at para. 101.

The panel's decision bears the hallmarks of reasonableness. The reasons are transparent and intelligible, and the outcome is justifiable in light of the record and the relevant legal parameters discussed in *Sherman Estate*. Thus, Mr. Fairgrieve has failed to demonstrate that the panel's decision is unreasonable. (at para. 136-137)

[ 35 ] While an accused's right to a fair trial is undoubtedly an important public interest on the first element of the *Sherman Estate* test, the Board is not persuaded that the open court principle poses a serious risk to Mr. Palmer's right to a fair trial in the circumstances of this case.

[ 36 ] Mr. Palmer states that disclosure of medical information "may" play a role in the resolution of his charges in court and "could" have an impact on his trial. As in Mr. Fairgrieve's case, the Board finds that Mr. Palmer's argument of potential prejudice to his fair trial rights is ill-defined and speculative. This is particularly so upon considering, as the Board did in Mr. Fairgrieve's case, that juries are expected to behave in accordance with their oaths and the vast majority of criminal trials can proceed fairly even in the face of some publicity. Additionally, gaps in time between the reporting of information in the media



and the date of a jury trial further reduces the risk of an unfair trial and there is likely to be such a gap in Mr. Palmer's case, if, in fact, he ever stands trial.

[ 37 ] The Board also notes, as it did in Mr. Fairgrieve's case, that reasonably alternative measures exist to mitigate any perceived prejudice to Mr. Palmer's fair trial rights such as jury instructions and challenges for cause during jury selection which offer further protection against an unfair trial.

[ 38 ] Additionally, as a matter of proportionality, the Board notes, as it did in Mr. Fairgrieve's case, that the benefits of maintaining the open court principle in furtherance of the Board's important public safety mandate outweighs any speculative prejudice to the accused's fair trial rights.

[ 39 ] Accordingly, the Board finds that Mr. Palmer's speculative assertion of prejudice to his fair trial rights is insufficient to displace the presumption of the open court principle.

#### Pre-existing publication bans

[ 40 ] There are two pre-existing court ordered publication bans that remain in effect for Mr. Palmer's case.

[ 41 ] During the course of the preliminary inquiry into Mr. Palmer's murder charge, the inquiry was paused while a separate inquiry was made into his fitness to stand trial pursuant to s. 672.11 of the *Criminal Code*. He was subsequently found unfit to stand trial by the British Columbia Provincial Court on April 29, 2021 after a trial of the fitness issue. Currently, the preliminary inquiry on the murder charge is paused while the accused is under Board jurisdiction.

[ 42 ] At the outset of the preliminary inquiry, the judge imposed a publication ban pursuant to s. 539 of the *Criminal Code* which provides that "the evidence taken at the inquiry shall not be published in any document or broadcast or transmitted in any way" before such time as "the accused is either discharged or ordered to stand trial". The preliminary inquiry has not yet concluded, and the publication ban remains in effect.

[ 43 ] In addition, at the accused's fitness hearing on April 29, 2021, the judge imposed a publication ban on the evidence taken at the fitness hearing. This publication ban also remains in effect.

[ 44 ] The parties submit that, at a minimum, the Board should make any necessary redactions to its reasons for disposition to comply with the bans.

